Arab-Malaysian Finance Bhd v Samian bin Sabin & Anor

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–13 OF 2001
LOW HOP BING J
21 FEBRUARY 2003

Hire Purchase *— Breach of agreement — Failure to pay instalments — Plaintiff did not give registration card or log book of bus to first defendant under hire-purchase agreement — Whether non-delivery of the registration card a fundamental breach of the hire-purchase agreement*

Hire Purchase *— Ownership — Goods under hire-purchase — Plaintiff did not give registration card or log book of bus to first defendant under the hire-purchase agreement — Whether plaintiff or first defendant was the owner of the bus — Whether s 13(2)(d) and (3) of the Road Transport Act 1987 or s 2(1) of the Hire-Purchase Act 1967 applied — Road Transport Act 1987 s 13(2)(d), (3) — Hire-Purchase Act 1967 s 2(1)*

This was an appeal by the plaintiff against the decision of the sessions court judge who dismissed with costs the plaintiff's claim for RM60,574.72 and allowed the defendants' counterclaim for RM17,000 with interest and costs. On 1 April 1992, the plaintiff and the first defendant entered into a hire-purchase agreement wherein the plaintiff granted the first defendant a hire-purchase facility for the purpose of purchasing a bus. The second defendant executed a guarantee to guarantee the due and punctual payment by the first defendant on the same day. The first defendant failed or neglected to pay and the plaintiff commenced this action against the defendants for the above sum. The defendants filed their defences and also counterclaimed. The learned sessions court judge stated that the plaintiff had failed to produce the hire-purchase agreement and the guarantee as documentary exhibits and that from the date of the execution of the two documents until now, the plaintiff had not given the registration card or the log book for the bus and the defendants could not use the bus because they could not effect payment of the road tax. Counsel for the plaintiff stated that in practice, the previous registered owner usually handed the registration card to the new owner and if this did not happen, the new owner could apply to the Road Transport Department for a new registration card. Such cards are not kept with the finance company unless the hirer expressly consents. Thus, at most the plaintiff's non-delivery of the registration card was only a breach of warranty that entitled the defendants to damages. Further, the plaintiff stated that since the bus was manufactured in 1980, all conditions and warranties as to quality, fitness and suitability were expressly negatived. The defendants stated that the definition of 'owner' in s 13(2)(d) and (3) of the Road Transport Act 1987 did not apply but s 2(1) of the Hire-Purchase Act 1967 applied and that the plaintiff was the owner and should have provided the registration card which was a condition precedent to the

operation of the hire-purchase agreement. The non-delivery was a breach of a fundamental term in the hire-purchase agreement and there was a total failure of consideration. A

Held, dismissing the appeal with costs:

(1) In the appeal, upon the submission by learned counsel for the plaintiff that the first and second defendants had expressly admitted the execution of these two documents, this execution of the two documents was conceded by learned counsel for the first and second defendants (see p 408C–D). B

(2) There was merit in the submission for the defendants that the definition of 'owner' in the context of the present appeal which concerned a hire-purchase agreement was to be governed by s 2(1) of the specific Act, ie the Hire-Purchase Act 1967, in which case the definition of 'owner' in s 2 of the Road Transport Act 1987 would not apply: *generalia specialibus non derogant*. In the circumstances, by virtue of s 2(1) of the Hire-Purchase Act 1967, an owner means a person who lets or has let goods (here the bus) under a hire-purchase agreement and includes a person to whom the owner's rights or liabilities under the agreement have passed by assignment or by operation of law. The plaintiff was the owner for the purposes of the hire-purchase agreement which also described the plaintiff as the owner of the goods (see p 409C–D, E–F). C D E

(3) Being the owner, it was the plaintiff's duty to produce the registration card for registration in the name of the first defendant and then to endorse thereon the plaintiff's claim of ownership, but the plaintiff failed to do so, as a result of which the defendants were unable to renew the road tax and use the bus on the road as a school bus (see p 409H–I). F

(4) It was also the plaintiff's duty as owner to transfer possession of the goods, ie the bus, from the plaintiff to the first defendant as hirer, as the hiring did not commence until the bus had been delivered to the hirer and that delivery shall be accompanied by the registration card to enable the hirer to pay or renew the road tax in order to bring the bus to function on the road (see p 410A). G

(5) In the light of the fundamental breach of the plaintiff arising out of the non-delivery of the registration card or log book to the first defendant and so the incapacitation of the first defendant's use of the bus in question which goes to the root of the hire-purchase agreement, the first defendant was entitled to treat himself as having been discharged from further liability under the hire-purchase agreement. On the total failure of consideration in relation to the RM17,000 paid by the first defendant to the plaintiff pursuant to the hire-purchase agreement for which no H I

registration card was delivered by the plaintiff to the first defendant, the first defendant may have either relied on the plaintiff's breach of the hire-purchase agreement and claimed for damages or have sued the plaintiff on the basis of quasi-contract for the return of the money (see p 410G–I).

[Bahasa Malaysia summary

Ini merupakan rayuan oleh plaintif terhadap keputusan hakim mahkamah sesyen yang telah menolak dengan kos tuntutan plaintif untuk RM60,574.72 dan telah membenarkan tuntutan balas defendan-defendan untuk RM17,000 dengan faedah dan kos. Pada 1 April 1992, plaintif dan defendan pertama telah memasuki perjanjian sewa beli di mana plaintif telah memberi kepada defendan pertama kemudahan sewa beli untuk membeli sebuah bas. Defendan kedua telah melaksanakan suatu jaminan untuk menjamin bayaran yang perlu dijelaskan dan tepat pada masa plaintif pada hari sama. Defendan pertama telah gagal atau abai membayar dan plaintif telah memulakan tindakan ini terhadap defendan-defendan untuk jumlah tersebut. Defendan-defendan telah memfailkan pembelaan dan juga telah menuntut balas. Hakim mahkamah sesyen yang arif telah menyatakan bahawa plaintif telah gagal mengemukakan perjanjian sewa beli dan jaminan tersebut sebagai ekshibit dokumentar dan bahawa daripada tarikh perlaksanaan dua dokumen tersebut sehingga sekarang, plaintif belum memberi kad pendaftaran ataupun buku log untuk bas dan defendan-defendan tidak dapat menggunakan bas tersebut kerana mereka tidak dapat membayar cukai jalan. Peguam plaintif telah menyatakan bahawa dalam amalan, pemunya terdahulu biasanya memberi kad pendaftaran kepada pemunya baru dan jika ini tidak dilakukan, pemunya baru boleh memohon kepada Jabatan Pengangkutan Jalan untuk kad pendaftaran yang baru. Kad-kad seperti ini tidak disimpan oleh syarikat kewangan kecuali jika penyewa nyata bersetuju. Oleh itu, paling lebih, kegagalan plaintif untuk memberi kad pendaftaran hanya merupakan perlanggaran waranti yang memberi hak kepada defendan-defendan untuk menuntut ganti rugi. Lagipun, plaintif menyatakan bahawa memandangkan bahawa bas tersebut dibuat pada tahun 1980, segala syarat-syarat dan waranti-waranti yang berkait dengan kualiti dan kesesuaian telah dinegatifkan. Defendan-defendan telah menyatakan bahawa tafsiran 'owner' di dalam s 13(2)(d) dan (3) Akta Pengangkutan Jalan 1987 tidak terpakai tetapi s 2(1) Akta Sewa Beli 1967 terpakai dan plaintif merupakan pemunya dan patut memberi kad pendaftaran yang merupakan syarat terdahulu kepada pengendalian perjanjian sewa beli tersebut. Kegagalan menghantar-serah kad pendaftaran tersebut merupakan perlanggaran terma yang asasi di dalam perjanjian sewa beli tersebut dan terdapat kegagalan balasan.

Diputuskan, menolak rayuan dengan kos: A

(1) Di dalam rayuan ini, setelah peguam plaintif berhujah bahawa defendan-defendan pertama dan kedua telah mengaku dengan nyata perlaksanaan dokumen-dokumen tersebut, perlaksanaan kedua-dua dokumen telah diakui oleh peguam-peguam defendan pertama dan kedua yang bijaksana (lihat ms 408C–D). B

(2) Terdapat merit di dalam hujahan untuk defendan-defendan bahawa tafsiran perkataan 'owner' di dalam konteks rayuan kini mengenai perjanjian sewa beli dikuasai oleh s 2 Akta khusus, iaitu Akta Sewa Beli 1967, dan tafsiran 'owner' di dalam s 2 Akta Pengangkutan Jalan 1987 tidak terpakai. *Generalia specialibus non derogant.* Di dalam keadaan ini, melalui s 2 Akta Sewa Beli 1967, pemunya bermakna seorang yang menyewa atau telah menyewa barang-barang (bas di sini) di bawah perjanjian sewa beli dan ini termasuk seorang kepada mana hak-hak dan liabiliti-liabiliti di bawah perjanjian telah diberi melalui penyerahanhak atau melalui undang-undang. Plaintif merupakan pemunya untuk tujuan perjanjian sewa beli tersebut yang juga menyifatkan plaintif sebagai pemunya barangan tersebut (lihat ms 409C–D, E–F). C D

(3) Sebagai pemunya, ia merupakan tanggungjawab plaintif untuk mengemukakan kad pendaftaran tersebut untuk pendaftaran di dalam nama defendan pertama dan kemudian untuk mengendorskan padanya tuntutan pemunyaan plaintif, tetapi plaintif gagal membuat sedemikian dan ini mengakibatkan defendan-defendan tidak dapat memperbaharui cukai jalan dan menggunakan bas di atas jalan sebagai bas sekolah (lihat ms 409H–I). E F

(4) Ia juga merupakan tanggungjawab plaintif sebagai pemunya untuk memberi milikan barangan tersebut, iaitu bas, daripada plaintif kepada defendan pertama sebagai penyewa, kerana penyewaan tersebut tidak bermula sehingga bas tersebut telah dihantar-serah kepada penyewa dan hantar-serah tersebut mesti bersama kad pendaftaran untuk membolehkan penyewa membayar atau memperbaharui cukai jalan supaya bas digunakan di jalan (lihat ms 410A). G

(5) Memandangkan perlanggaran asasi plaintif yang berbangkit daripada kegagalan plaintif untuk menghantar-serah kad pendaftaran atau buku log kepada defendan pertama dan kerana defendan tidak dapat menggunakan bas tersebut dan ini sehingga akar umbi perjanjian sewa beli, defendan pertama berhak untuk menganggap dirinya sebagai telah dilepaskan daripada liabiliti selepas ini di bawah perjanjian sewa beli. Pada perkara kegagalan balasan berhubung dengan RM17,000 yang dibayar oleh defendan pertama kepada plaintif menurut perjanjian sewa beli yang mana tiada kad pendaftaran diserah-hantar oleh plaintif kepada defendan pertama, defendan pertama boleh bergantung H I

kepada perlanggaran perjanjian sewa beli oleh plaintif dan menuntut ganti rugi atau mendakwa plaintif pada dasar kuasi-kontrak untuk pemulangan wang tersebut (lihat ms 410G–I).

Notes

For cases under failure to pay instalments, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3422–3425.

For cases under goods under hire-purchase, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), para 3488–3489.

Cases referred to

BBMB Kewangan Bhd v Tan Swee Heng & Anor [2002] 7 CLJ 377 (refd)

Bentworth Finance Ltd v Lubert & Anor [1967] 2 All ER 810 (refd)

Credit Corporation (M) Bhd v The Malaysia Industrial Finance Corpn & Anor [1976] 1 MLJ 83 (refd)

Hwa Chea Lin & Anor v Malim Jaya (Melaka) Sdn Bhd [1996] 4 MLJ 544 (refd)

Low Ping Ming v MBf Finance Bhd [2000] 2 CLJ 307 (refd)

Legislation referred to

Contracts Act 1950 s 40

Hire-Purchase Act 1967 s 2(1)

Road Transport Act 1987 ss 13(2)(d), (3)

Hargopal Singh (*Hargopal Singh & Co*) for the plaintiff.

A Sethu (*Syarikat A Sethu*) for the first and second defendants.

Low Hop Bing J:

Appeal

This is an appeal by the plaintiff against the decision of the learned sessions court judge who had on 1 February 2001 dismissed with costs the plaintiff's claim for RM60,574.72 and allowed the defendants' counterclaim for RM17,000 with interest and costs.

Facts of the case

On 1 April 1992, the plaintiff and the first defendant entered into a hire-purchase agreement wherein the plaintiff had granted to the first defendant a hire-purchase facility for the purpose of purchasing a motor vehicle, ie a bus bearing registration number DG 2273.

On the same date, the second defendant executed a guarantee wherein the second defendant guaranteed the due and punctual payment by the first defendant of all sums payable under the hire-purchase agreement to the plaintiff.

The first defendant's failure or neglect to pay according to the terms of the hire-purchase agreement resulted in the plaintiff's commencement of this action against the defendants for the aforesaid sum of RM60,574.72 as at 12 February 1998. A

The defendants in addition to their defence, filed the said counterclaim against the plaintiff. B

Existence of hire-purchase agreement

The learned sessions court judge stated in the grounds of decision that the plaintiff has failed to produce the hire-purchase agreement and the guarantee as documentary exhibits since these documents were merely marked as ID2 and ID3 respectively, ie for purposes of identification as opposed to the marking as exhibits such as 'P2 and P3'. Be that as it may, in the appeal before me, upon the submission by learned counsel Mr Hargopal Singh for the plaintiff that the first and second defendants had expressly admitted the execution of these two documents, this execution of the two documents was conceded by learned counsel Mr A Sethu for the first and second defendants. C D

In the circumstances, the existence of these two important documents which are now the subject matter of the appeal herein had never been doubted and so the appeal shall henceforth be proceeded with on this basis.

In the light of the said admission by the first and second defendants, the failure on the part of the plaintiff in calling the manager of Eul Motors or the officer signing these two documents on behalf of the plaintiff as witnesses would, in my view, be of no consequence at all. E

Registration card for the bus

F

The submission for the plaintiff in the appeal before me did demonstrate and indeed confirm the finding of fact by the learned sessions court judge that from the date of the execution of the two documents until now the plaintiff had not given the defendants the registration card or the log book for the bus, in which case the defendants' use of the bus was incapacitated in that the defendants were unable to effect payment of the road tax for the bus which meant that the bus could not be on the road at all. G

Learned counsel for the plaintiff attempted to overcome this issue by explaining that in practice, the registration card of a motor vehicle was usually handed over by the previous registered owner to the new owner and that if this was not done, the new registered owner could apply to the Road Transport Department for a new registration card in order to renew the road tax. He added that the registration card was not kept by the finance company such as the plaintiff unless there was express consent of the hirer. It was argued for the plaintiff that at most, the plaintiff's non-delivery of the registration card is only a breach of warranty which merely entitled the defendants to damages. H I

On the defendants' inability to use the bus, it was contended for the plaintiff that the bus in question was manufactured in 1980 and that being

A a second-hand bus, all conditions and warranties as to quality and as to fitness and suitability were expressly negatived.

For the defendants, it was submitted that the provisions of s 13(2)(d) and s 13(3) of the Road Transport Act 1987 in relation to the definition of 'owner' would not apply but instead its definition is governed by the B provisions of s 2(1) of the Hire-Purchase Act 1967. In this context, he added that the plaintiff was the owner who should produce the registration card for registration in the name of the first defendant, which he said was a condition precedent to the operation of the hire-purchase agreement. He stressed that the non-delivery of title was a breach of a fundamental term by the plaintiff and that there was a total failure of consideration.

C In my judgment, I hold that there is merit in the submission for the defendants that the definition of 'owner' in the context of the present appeal which concerns a hire-purchase agreement was to be governed by s 2(1) of the specific Act, ie the Hire-Purchase Act 1967, in which case the definition of 'owner' in s 2 of the Road Transport Act 1987 would not apply. *Generalia* D *specialibus non derogant*: see also *BBMB Kewangan Bhd v Tan Swee Heng & Anor* [2002] 7 CLJ 377 at p 392 per Ramly Ali J.

The first defendant was the hirer and even if the hirer were the registered owner of the car, the hirer was in law the person who had possession and use of the car and that fact did not necessarily make him the E legal owner of the car: per Abdul Hamid J (later LP) in *Credit Corporation (M) Bhd v The Malaysia Industrial Finance Corpn & Anor* [1976] 1 MLJ 83.

In the circumstances, by virtue of s 2(1) of the Hire-Purchase Act 1967, an owner means a person who lets or has let goods (here the bus) under a hire-purchase agreement and includes a person to whom the owner's rights or liabilities under the agreement have passed by assignment or by operation F of law. The plaintiff is, in my view, the owner for the purposes of the hire-purchase agreement which also described the plaintiff as the owner of the goods, ie the bus let on hire.

A classic description of a hire-purchase agreement was given by Steve Shim J (now CJ (Sabah and Sarawak)) in *Low Ping Ming v MBf Finance Bhd* G [2000] 2 CLJ 307 as follows:

> A common characteristic or feature of such an agreement is that the hirer has the option of purchasing the goods. And throughout the period of hire-purchase, title to the goods remains with the owner. ... It is common practice nowadays for a finance company to be involved in a hire-purchase transaction as owner. For example, the finance company buys the goods from the dealer H who is paid the price and the finance company then steps into the dealer's shoes and becomes the owner for the purpose of the hire-purchase agreement. In this way, the finance company becomes the owner as well as financier.

Being the owner, it is the plaintiff's duty to produce the registration card for registration in the name of the first defendant and then to endorse thereon I the plaintiff's claim of ownership, but the plaintiff has failed to do so, as a result of which the defendants were unable to renew the road tax and use the bus on the road as a school bus.

It is also the plaintiff's duty as owner to transfer possession of the goods, ie the bus, from the plaintiff to the first defendant as hirer, as the hiring did not commence until the bus has been delivered to the hirer and that delivery shall be accompanied by the registration card to enable the hirer to pay or renew the road tax in order to bring the bus to function on the road.

A substantially similar situation arose in *Bentworth Finance Ltd v Lubert & Anor* [1967] 2 All ER 810, where the plaintiff finance company agreed to let a car to L under a directly financed transaction under which M agreed to act as surety for L. The dealer left the car, unlicensed and untaxed outside L's house, and L neither used the car nor paid any instalments. In dismissing the plaintiff's action against L for arrears of instalments and against M under the contract of surety, the English Court of Appeal held that it was an implied condition of the hire-purchase agreement that the log book should be supplied, and until it was supplied there was no contract and no instalment became due and that the loss or damage that the plaintiff suffered did not arise from the hire-purchase agreement being unenforceable, but from the plaintiff allowing the car to be delivered by the dealers without the log book.

Lord Denning MR said at p 811, inter alia, that it is the common understanding of people that if a car is bought or is taken on hire-purchase, the log book will be provided and that it is a practical necessity also for the hirer to have the log book. He has to produce it in order to get the car licensed so as to be on the road. The learned Master of the Rolls added that the provision of the log book is a condition on which the very existence of the contract depended, and that until the log book was provided there was no contract of hire-purchase at all. No instalment, therefore, fell due.

Further, I agree with the learned author, RM Goode, in his book *Hire-Purchase Law and Practice* (2nd Ed) at p 215 that in most hire-purchase contracts, the condition of title is a fundamental obligation and that:

> On breach of the condition of title, the hirer becomes entitled to treat the agreement as discharged and may either sue for damages for breach of contract or bring an action in quasi-contract for the return of all monies paid by him under the agreement as having paid on a consideration which has wholly failed.

In the light of the fundamental breach of the plaintiff arising out of the non-delivery of the registration card or log book to the first defendant and so the incapacitation of the first defendant's use of the bus in question which goes to the root of the hire-purchase agreement, the first defendant is entitled to treat himself as having been discharged from further liability under the hire-purchase agreement: s 40 of the Contracts Act 1950; *Hwa Chea Lin & Anor v Malim Jaya (Melaka) Sdn Bhd* [1996] 4 MLJ 544 per Suriyadi J.

On the total failure of consideration in relation to the RM17,000 paid by the first defendant to the plaintiff pursuant to the hire-purchase agreement for which no registration card was delivered by the plaintiff to the first defendant, the first defendant may either rely on the plaintiff's breach of the hire-purchase agreement and claim for damages or sue the plaintiff on the basis of quasi-contract for the return of the money. (See *Cheshire*

Fifoot and Furmston's Law of Contract (2nd Singapore and Malaysian Ed 1998) by Andrew Phang Boon Leong, p 1117 'Total Failure of Consideration'). This was essentially expressed in the defendant's counterclaim against the plaintiff.

Conclusion

On the foregoing grounds, I am of the view that the decision of the learned sessions court judge was correct which I hereby affirm. I therefore dismiss this appeal with costs.

Appeal dismissed.

Reported by Chew Phye Ken